Missouri Statute Of Limitations And Wrongful Birth

by Nicolas P. Terry

Although it is not unknown for a court to take away with one hand that which it has just given with the other, seldom has this been better illustrated than with the recent application of the Missouri statute of limitations to wrongful birth actions. In *Miller v. Duhart*, 637 S.W.2d 183 (Mo. Ct. App. 1982), the Missouri Court of Appeals for the Eastern District was confronted with actions brought against medical care providers for the allegedly negligent performance of a sterilization procedure. Virginia Miller, the mother of four children, retained defendants to perform her bilateral tube ligation. The procedure was performed on August 25, 1976. Yet on February 21, 1980 a fifth child, Dawon, was born to the Millers. Suit was brought against the surgeons and the hospital by the entire Miller family.

Missouri law is considered to be quite liberal in its recognition of causes of action for preconception and pre-natal injuries.[1] Crucially, however, the allegations in *Miller* were *not* to the effect that defendants' negligence caused *physical* injury to the fetus, but rather that their alleged negligence was, in some way, responsible for the existence of the fetus, and hence the child. As such, the *Miller* court was asked to determine whether the law of Missouri recognized causes of action for what have become known as *wrongful birth* and *wrongful life*. Although, as will be discussed, the court rejected the wrongful life action, it approved the wrongful birth count.[2] As support for this latter holding the court described such an action as "merely a descriptive label for a form of malpractice," 637 S.W.2d 183 at 184. Mr. and Mrs. Miller brought a wrongful conception action, claiming damages incurred before Dawon's birth as well as additional expenses which they would incur in raising him.[5]
ultimate downfall. The purpose of this article is to examine the holdings of the *Miller* court with regard to the contended for causes of action and to determine the extent to which the statute of limitations impacts upon them.

I. The background — wrongful birth and wrongful life

The cases discussed herein all involve a plaintiff's allegation that defendant wrongfully caused the existence of a fetus. Thus, the most important initial distinction to be made turns on the identity of the plaintiff. If the action is brought by the child, it is properly described as an action for *wrongful life*. If the action is brought by the child's parents or sibling, it is to be labelled an action for *wrongful birth*.

Although, as has been stressed, neither allegation is premised on injury caused to the fetus by defendant, it does not necessarily follow that the child will *not* be born in an injured state. As such, in order to understand the decisional law, it is important to make a second distinction, as to whether the child is born in a *healthy* or *defective*[3] condition. Also, it should be noted that the term "wrongful conception" is used by some courts to denote a particular species of "wrongful birth," *i.e.* cases in which the pregnancy resulted from failed contraception or sterilization, as distinguished from, for example, failure to terminate or diagnose a pregnancy.[4]

1. *See, eg. Bergstreser v. Mitchell*, 577 F.2d 22, 25-26 (8th Cir. 1978), (action for negligently performed Caesarean section resulting in premature delivery of damaged infant). *Cf. Olejniczak v. J. S. Whitten*, 605 S.W.2d 143 (Mo. Ct. App. 1980) in accord with *State ex rel. Harvin v. Sanders*, 538 S.W.2d 336 (Mo. *en banc* 1976) (wrongful death statute allows recovery only for the death of a person; a fetus is not a person).
2. Although in the context of discussing an action for "wrongful conception" a concept to be discussed in the next section.
3. Typically, the defective condition is caused by a hereditary disease or a birth defect.
4. In *Miller*, 637 S.W.2d 183, 188, the court adopted the "wrongful conception" terminology. As to these matters and also the meaning of "wrongful pregnancy," *see* Terry, "The Right Not to be Born; The Right Not to Give Birth," *Vol. I, Missouri Tort Law*, §7.1 (1982 Supp.).

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II. The Miller decision

The three allegations in *Miller* all concerned the birth of a healthy Dawon Miller — there was no allegation that he was born in a defective condition. Dawon himself brought a wrongful life action; his four siblings alleged wrongful birth, citing, "[T]he loss of their mother's and father's society, care, comfort, and protection as well as the loss of financial support resulting from the birth of the additional sibling." 637 S.W.2d 183 at 184. Mr. and Mrs. Miller brought a wrongful conception action, claiming damages incurred before Dawon's birth as well as additional expenses which they would incur in raising him.[5]

The court of appeals held that, under the law of Missouri, Dawon Miller could not bring an action for wrongful life; dismissed the other Miller children's claim for wrongful birth as not "legally cognizable"; and held that, although Dawon's parents stated a good cause of action (for wrongful birth) it was, nevertheless, barred by the two year limitation period provided for in §516.105. Specifically, as to this last point, plaintiffs made three attempts to avoid the rigors of §516.105. First, plaintiffs claimed the statute should have begun to run at the time of the child's birth rather than at its conception.[6] Second, plaintiffs argued that continuous treatment of the mother and her newborn son tolled the running of the limitations period. Finally, plaintiffs attempted to persuade the court to adopt a discovery rule, which would also have tolled the statute.[7] The *Miller* court ultimately rejected all three contentions.

III. The Statute of Limitations

As the *Miller* court was forced to conclude, §516.105 "is written with clarity and precision." 637 S.W.2d 183 at 190. This section provides that:

> All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of, except that a minor under the full age of ten years shall have until his twelfth birthday to bring action, and except that in cases in which the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs, but in no event shall any action for damages for malpractice, error, or mistake be com-

menced after the expiration of ten years from the date of the act of neglect complained of.

A statute of limitations could be viewed as no more than the doctrine of laches[8] but with the requirement of prejudice to the defendant conclusively presumed after the expiration of the specific period contained in the statute. As such, it is arguable that a statute of limitation, properly so-called, "imposes only a duty of reasonable care upon a potential plaintiff, not the risk of non-discovery despite the exercise of due diligence." *Brown v. Mary Hitchcock Memorial Hospital*, 378 A.2d 1138, 1140 (N.H. 1977). Thus, §516.105 is more aptly described as a statute of repose; the statute clearly contemplates a *Miller* type result in that it is possible for the most diligent of plaintiffs to have his action statute-barred. It is hardly surprising, therefore, that the *Miller* court directed the following plea to the General Assembly — "the legislature is strongly urged to correct the inequity which the present malpractice statute creates in discovery cases other than those concerned with foreign objects." 637 S.W.2d 183 at 190.

In some jurisdictions there have been successful attempts at challenging statutes of repose. *See Diamond v. E. R. Squibb & Sons, Inc.*, 397 So.2d 671 (Fla. 1981), *cf. Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d 560 (Ill. 1979).

However, a direct attack on the constitutionality of §516.105 when applied to facts substantially the same as in *Miller* has already failed, *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397 (Mo. 1980)[9] and there seems little chance that any such arguments will be better received at the federal

5. Additionally, Mr. Miller claimed damages for loss of consortium. On this narrow issue, *see Anonymous v. Hospital*, 35 Conn. Supp. 112, 398 A.2d 312 (1979); *cf. Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982) (husband allowed to bring cause of action for loss of consortium).

6. Exactly what such a characterization would have achieved is unclear, since §516.105, in stating that "all actions . . . shall be brought within two years from the date of the occurrence of the *act of neglect*" (emphasis added) must clearly be referring to the act of defendant (the purported sterilization) and not to any consequential act of plaintiff (*e.g.*, the birth).

7. The wording of §516.105 clearly rules out any possibility of a special "discovery" type rule for wrongful birth cases. *Cf. Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974), *Paul v. State of New York*, 59 A.D.2d 800, 398 N.Y.S.2d 768 (N.Y. App. Div. 1977), *Christ v. Lipsitz*, 99 Cal. App. 3d 894, 160 Cal. Rptr. 498 (1979), Annot. 93 A.L.R.3d 218.

8. "[T]he neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done." *Lake Development Enterprise v. Kojetinsky*, 410 S.W.2d 361, 367 (Mo. Ct. App. 1966).

level. *Winters v. Beck*, 79 A.D.2d 706, (1980); *aff'd* 53 N.Y.2d 795, 54 N.Y.2d 601 (1981), *cert. den.* 50 USLW 3248 (Oct. 5, 1981).

IV. Exceptions to the limitation period

It is assumed that the unpredictable nature of the human reproductive system will result in many wrongful birth cases falling outside the two year limitation, thus substantiating the *Miller* court's concern with the corresponding "inequity." 637 S.W.2d 183 at 190. Given, furthe', that §516.105 is "written with clarity and precision" (*Id.* at 190) and is apparently impervious to constitutional bombardment, it remains for an examination to be made as to the possible routes that may be taken to alleviate this singular problem. As such, a reexamination of the contended for wrongful life action will be made together with an analysis of the application of some of the more traditional exceptions to periods of limitations to wrongful birth actions.

A. Wrongful life

In denying Dawon Miller's claim for wrongful life the court of appeals was following a well-established line of cases. From *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (Ill. Ct. App. 1963), to *Curlender V. Bio-Science Laboratories*, 106 Cal. App.3d 811, 165 Cal. Rptr. 477 (1980), wrongful life actions brought by healthy children have flourished. The attractiveness of such a cause of action in the *Miller* type case is, of course, that under §516.105 the statute of limitations is tolled for a minor until his twelfth birthday.[10] Although a pessimistic view as to the acceptability of the cause of action with regard to status-based damage claims seem reasonable,[11] it does not follow that claims such as that made by Dawon should be rejected so perfunctorily.

In rejecting the wrongful life claim before it, the *Miller* court used familiar reasoning. First, the insufficiently articulated "floodgates" argument first seen in *Zepeda v. Zepeda, supra,* to the effect that the recognition of an action for wrongful life would entail recognition of, or at least encourage, suits brought by all manner of disadvantaged persons. Second, the court refers to what it sees as the impossibility of ascertaining damages in such a case — a statement premised on the unexplained presumption that this could only be achieved by a comparison between existence and nonexistence. Third, the court makes the conclusory and tautologous holding that the defendants here owed plaintiff no duty of care, that plaintiff had suffered no "cognizable injury." (637 S.W.2d 193, at 187.)

Key to any reappraisal of the wrongful life issue decided in *Miller* is an appreciation of the change in attitude that may be detected in some recent opinions with respect to wrongful life cases in which the child plaintiff was born in a *defective* condition. In *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981), suit was brought by a child suffering from neurofibromatosis (a congenital, incurable disease) against defendants whose alleged negligence had caused her birth (one defendant had performed a purported vasectomy on plaintiff's father; the other had failed to terminate plaintiff herself).

9. Such an attack had perhaps been encouraged by the attitude of the supreme court the year before when it struck down §516.105's sister legislation in *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 538 S.W.2d 107 (Mo. 1979)

10. *En passant* it is unclear whether the *ten* year statute of repose contained at the end of §516.105 applies only to "foreign object" cases, or also to minors; e.g. in Dawon Miller's case would the statute have been tolled until he was twelve (February 21, 1992) or only until August 25, 1986 (ten years from the "act of neglect complained of").

11. *See* Terry, *op. cit.* at §7.2.

The Supreme Court of Pennsylvania was evenly divided on the question and so the lower court's opinion was affirmed. *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. 1979.) Nevertheless, the approach taken by those on the court in favor of permitting a wrongful life cause of action deserves attention. Flaherty J. stated:

> The view that we cannot calculate the value of existence as compared to nonexistence is only one such hyperscholastic rationale used to deny a cause of action in these cases. Those holding such views are apparently able to overlook what is plain to see: that – in cases such as this – a diseased plaintiff exists and, taking the allegations of the complaint as true, would not exist at all but for the negligence of the defendants." 439 A.2d 110 at 115.

Concurring, Kauffman, J. was of opinion that, "To permit such a wrong to go unredressed would provide no deterrent to professional irresponsibility and would be neither just nor compatible with this Commonwealth's principles of tort liability." *Id* at 118.

This dual approach of deterring negligent conduct and refusing to permit vague metaphysical references obscure the need for a pragmatic approach to compensation of an injured plaintiff is also reflected in the decision of the California appellate court in *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980). It is an approach that has now been endorsed by the California Supreme Court in *Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

Plaintiff in *Turpin* was born with a hereditary total deafness condition. The California Supreme Court, in a landmark decision, permitted her to state a cause of action against defendants who had failed to diagnose the existence of the same defect in her elder sister prior to plaintiff's conception. The major breakthrough in *Turpin* was that the court was prepared to view the wrongful life claim as "simply one form of the familiar medical or professional malpractice action" (*Id.* at p. 342), and that the real issue before the court was the determination as to what damages were recoverable. For the *Turpin* court, therefore, the resolution of whether existence (or as the court more accurately analyzed it, existence in a defective state) could be compared to nonexistence was not dispositive of the case. The *Turpin* court was thus able to conclude that although "In this context, a rational, nonspeculative determination of a specific monetary award in accordance with normal tort principles appears to be outside the realm of human experience" (*Id.* at p. 347), a remedy was still available to plaintiff. Although refusing to countenance a claim for general damages, the court did permit her to recover for the "extraordinary, additional expenses

that are occasioned by the hereditary ailment." *Id.* at p. 348.

The importance of the *Turpin* analysis is that it should facilitate recovery in a *Miller* type case, despite the fact that the latter case is not of the wrongful life — defective category. The reasons for this are threefold; first, the characterization of the wrongful life action as "simply one form of . . . malpractice," *Id.* at p. 342, eliminates the doctrinal problem of whether or not a duty of care exists. Such an approach is reminiscent of the *Miller* court's approach to wrongful birth. Second, the *Turpin* analysis admits of the child having an interest in the conveyance of correct information to the parents and the performance of correct procedures.

> Although in deciding whether or not to bear such a child parents may, properly, and undoubtedly do, take into account their own interests, parents also presumptively consider the interests of their future child. Thus when a defendant negligently fails to diagnose an hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine whether it is in the child's own interest to be born with defects or not to be born at all. *Id.* at p. 345.

Such an analysis makes clear the crucial nexus between wrongful birth and wrongful life actions. Henceforth, the parents' action and the child's action must be seen as inexorably linked — to recognize one should also mean acceptance of the other. Third, the *Turpin* court confirmed this approach by equating and limiting the damages that the child could recover under wrongful life to those that its parents could in a wrongful birth action. *See Id.* at p. 348.

When the rationale and final result of the *Turpin* case are examined, one question seems to spring to mind — why is it necessary for a child to have a cause of action which essentially parallels one that his parents have, that has the same theoretical and conceptual basis and that permits the award of no *additional* damages? An answer that perhaps suggests itself is that it would enable plaintiffs such as Dawon Miller to circumvent the trap set for his parents by §516.105.

B. Fraudulent concealment

The majority of jurisdictions recognize that fraudulent concealment of a cause of action constitutes an implied exception to the statute of limitations. Such an exception seems grounded on the general principle of refusing to allow a defendant to take advantage of his own wrong. (*See* 51 Am. Jur. 2d §146-152.) In Missouri this exception derives from a statutory tolling provision:

> If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein

limited, after the commencement of such action shall have ceased to be so prevented. §516.280, Mo. Rev. Stats.

There is a qualification to this provision contained in §516.300:

> The provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.

Despite the existence of a "special" statutory provision (now §516.105), relating to the medical malpractice limitation period, Missouri courts have been consistent in holding that this is insufficient to trigger §516.300 and that the fraudulent concealment tolling provision is therefore capable of application in medical malpractice cases. *See e.g. Kauchick v. Williams,* 435 S.W.2d 342 (Mo. 1968), *Brewington v. Raksakulthi,* 584 S.W.2d 112 (Mo. Ct. App. 1979), *Smile v. Lawson,* 435 S.W.2d 325 (Mo. 1968), *Swope v. Printz,* 468 S.W.2d 34 (Mo. 1971).

In *Swope v. Printz* the supreme court first delineated the six constituents that plaintiff must show in order to establish fraudulent concealment so as to toll the statute of limitation.

> (1) that in performing the surgery defendent did or failed to do something which causes the paralysis; (2) that defendent's conduct failed to meet the required standards of professional competence and therefore constituted negligence; (3) that defendant had actual knowledge that he caused the paralysis; (4) that with that knowledge defendent intended by his postoperative conduct and statements to conceal from plaintiffs the fact that they had a claim against him for malpractice by reason thereof; (5) that defendent's acts were fraudulent; and (6) that plaintiffs were not guilty of lack of diligence in not sooner ascertaining the truth with respect to the situation. 468 S.W.2d 34 at 38-9.

When applied to a wrongful birth allegation of the *Miller* type, it is clear that it is the second and third constituents that raise issues of most crucial importance.[12] Missouri courts appear to be liberal in their interpretation of these two constituents in medical malpractice cases. In *Kauchick v. Williams,* 435 S.W.2d 342 (Mo. 1968) and *Smile v. Lawson,* 435 S.W.2d 325 (Mo. 1968), the Missouri Supreme Court appeared to be close to favoring the position that *mere silence* by a physician can trigger the concealment provision. Certainly these majority opinions provoked a strong concurrence to the contrary in *Smile v. Lawson,* 435 S.W.2d at pp. 329-332. The liberal approach as to this constituent has been continued in *Martin v. Barbour,* 358 S.W.2d 200, 210-211 (Mo. Ct. App. 1977) and *Brewington v. Raksakulthi,* 584 S.W.2d 112, 115 (Mo. Ct. App. 1979).

In neither *Kauchick* nor *Smile* however would the court shade the requirement of "actual knowledge" so as to formally alter the constituent to, for example, "should have known." Nevertheless, in *Smile* the court did appear to view the constituent as a jury issue, and one capable of being established by inference from the available evidence, 435 S.W.2d at 328. This approach seems to have been confirmed in *Swope v. Printz,* 468 S.W.2d 34, 42, *Martin v. Barbour,* 588 S.W.2d 200, 209-210 (Mo. Ct. App. 1977) and *Brewington v. Raksakulthi,* 584 S.W.2d 112, 115 (Mo. Ct. App. 1979).

The advantages of a liberal approach to fraudulent concealment in typical wrongful birth cases may readily be appreciated from reference to *Hardin v. Farris,* 87 N.M. 143, 530 P.2d 407 (N.M. Ct. App. 1974), in which the court tolled the applicable statute of limitations in a case concerning an allegedly negligently performed tubal ligation, even though the defendant was silent as to the matter and apparently the only evidence of his knowledge of the ineffectiveness of the procedure was that a pathology report to that effect was on file. *See* also *Leagan v. Levine,* 158 Ga. App. 293 (1981).

C. Continuous treatment

Missouri also accepts continuous treatment as a tolling provision under the medical malpractice statute of limitations. In *Thatcher v. DeTar,* 173 S.W.2d 760, 763 (Mo. 1943) the court was of the opinion that:

> the overwhelming weight of authority is that where the facts are as disclosed in plaintiff's petition [post-operative care by same doctor for two years following appendectomy] the statute of limitations does not begin to run until the treatment of plaintiff's ailment by the defendant ceases.

Shaw v. Clugh, 597 S.W.2d 212 (Mo. Ct. App. 1980) concerned the alleged negligence of defendant in obtaining bone plugs for cervical fusion from plaintiff's right thigh. During the course of this procedure plaintiff's lateral femoral cutaneous nerve became entrapped. The question for the court thus became whether the statute of limitations ran from the time of the performance of the original operation or from the later corrective surgery. Key to this issue and to the decision of the court of appeals that the limitation period in *Shaw* ran from the time of the later treatment is that the court looks to the treatment

12. (1) and (2) would have to be established for there to be any malpractice action at all; (6) can be presumed in a case such as *Miller* where plaintiffs could hardly have been more diligent; (5) is at least arguably a conclusion drawn from the existence of (3) and (4) rather than an independent constituent.

as a whole. The emphasis is not so much on *continued* treatment, but rather on the fact that the treatment has *not yet terminated.*

Clearly the facts as disclosed in *Miller* were insufficient to justify a holding of continuous treatment (637 S.W.2d at 190) — the later treatment was with regard to a "related matter"and that doctor was not even one of defendants, thus defying any characterization as to non-termination of that particular patient-physician relationship. However, continuous treatment is an effective route where the existence of test procedures can be demonstrated. Examples from the wrongful birth area would include biopsy of tissue (in the case of a bilateral tubal ligation, *see eg., Hardin v. Farris,* 530 P.2d 407 (N.M. Ct. App. 1974), and sperm counts (in the case of vasectomy, *see e.g. Hackworth v. Hart,* 474. S.W.2d 377 (Ky. Ct. App. 1971)). More generally, a court will occasionally hold the relationship to be continued where there are post-operative appointments or other follow-up procedures (*e.g., Savitz v. Funk,* 64 Ohio App. 2d 29 (1979).

D. Contract action

There seems little doubt that a wrongful birth action based on alleged malpractice such as in *Miller* could be brought on a contract theory — breach of an implied term as to the possession of reasonable skill and care. *See,* Louisell and Williams, *Vol. I, Medical Malpractice* §8.03 (1981). It seems equally as true, however, that bringing action on such an *implied* term will not avoid the rigors of §516.105. *State ex rel. Sisters of St. Mary v. Campbell,* 511 S.W.2d 141, 146-47 (Mo. Ct. App. 1974).

The inclusion of such an implied warranty in §516.105 would not appear to be dispositive of an argument that defendant made an express warranty to achieve a particular result — in a *Miller* type case, sterilization. That such a warranty may be made seems clear. *Shaheen v. Knight,* 11 Pa. D. & C. 2d 41 (1957), *Mason v. Western Pennsylvania Hospital,* 428 A.2d 1366, 1368 (1981). It is certainly arguable that the breach of such a warranty could occur with or without the "malpractice, negligence, error or mistake" of the physician and thus would fall outside §516.105; such a guarantee would rather be governed by the period of limitations applying to contractual actions, §516.120. It is arguable that express warranties of sterility made pre-operatively do not need to be supported by additional consideration. Rather, the issue seems to be narrowed to the identification of sufficient evidence to support a finding of warranty. As was stated in *Sard v. Hardy,* 379 A.2d 1014, 1027 (Md. Ct. App. 1977), plaintiff must establish the existence of such a warranty "by clear and convincing evidence." Plaintiff's burden is a heavy one. In *Stephens v. Spiak,* 233 N.W.2d 124 (Mich. Ct. App. 1975), there is the suggestion that a physician's statement to the effect that the chances of becoming pregnant were "one in a million" was sufficient to undermine plaintiff's allegation of warranty of sterility.

V. Conclusion

While it is tempting to agree with the conclusion of *Miller* court that it is for the legislature to deal with this problem, it should, nevertheless, be conceded that §516.105 is unlikely to be altered.

As such, the inequities of a *Miller* type result must be avoided through more conventional means. By recognizing the action for wrongful life, by permitting plaintiff to sue on an express warranty theory and by demonstrating a liberal approach to the existing exceptions to the statute of limitations, some much needed flexibility could be imported into §516.105.